

² The Board notes that, following the April 16, 2019 decision, OWCP received additional evidence. However, the Board’s *Rules of Procedure* provides: “The Board’s review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.” 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the prior Board orders are incorporated herein by reference. The relevant facts are as follows.

On June 17, 2016 appellant, then a 53-year-old clerk (developmental), filed an occupational disease claim (Form CA-2) alleging that she developed lower back pain and right leg radiculitis due to the performance of critical federal job duties. She indicated that she first became aware of her condition and its relationship to her federal employment on March 19, 2015. Appellant resigned from the employing establishment effective May 17, 2015.

In support of her claim, appellant submitted medical evidence, including reports from Jennifer L. Davis, a nurse practitioner, and Karen Wong, a certified physician assistant. In a June 19, 2015 report, Ms. Wong discussed examination findings and provided assessments of cough variant asthma and allergic rhinitis, cause unspecified.

Appellant also submitted an October 12, 2016 lumbar spine magnetic resonance imaging (MRI) scan report by Dr. William Gonser, a Board-certified diagnostic radiologist. Dr. Gonser provided an impression of broad-based disc herniation and hypertrophic facet changes greatest at the L4-5 level causing left lateral recess stenosis and mild left foraminal stenosis.

OWCP, by decision dated November 2, 2016, denied appellant's occupational disease claim finding that she had not submitted a rationalized medical opinion from a physician explaining how her diagnosed conditions were causally related to the accepted factors of her federal employment. Consequently, OWCP concluded that the requirements had not been met to establish an employment-related injury or medical condition.

On January 3, 2017 appellant requested reconsideration and submitted additional medical evidence.

By decision dated March 14, 2017, OWCP modified the November 2, 2016 decision to reflect that the denial of appellant's claim was based on the finding that the factual component of fact of injury had not been established. It noted that the evidence of record did not either discuss factors of her federal employment or relate a diagnosed medical condition to her employment factors.

On April 3, 2017 appellant again requested reconsideration. She submitted additional medical and factual evidence in support of her reconsideration request.

³ *Order Dismissing Appeal*, Docket No. 17-1597 (issued November 16, 2017); *Order Dismissing Appeal*, Docket No. 18-1811 (issued February 27, 2019).

OWCP, by decision dated June 20, 2017, denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a) finding that the request did not establish that it had erroneously applied or interpreted a point of law, contain a relevant legal argument not previously considered, or include relevant and pertinent new evidence.⁴

On January 2, 2018 appellant requested reconsideration before OWCP and continued to submit factual and medical evidence.

By decision dated April 12, 2018, OWCP modified its March 14, 2017 decision, finding that the factual component of fact of injury had been established. The claim remained denied, however, because the medical evidence submitted was insufficient to establish a causal relationship between appellant's diagnosed conditions and the accepted factors of her federal employment.

Appellant requested reconsideration on May 10, 2018 and submitted additional medical evidence.

In an August 1, 2018 decision, OWCP denied modification of its April 12, 2018 decision. It found that the medical evidence submitted was insufficient to establish causal relationship.

On September 27, 2018 appellant appealed to the Board.

OWCP subsequently received a November 13, 2018 report by Dr. Hany Nasr, a Board-certified pain medicine specialist, who examined appellant and diagnosed lumbar radiculitis, lumbar degenerative disc disease, lumbar facet arthropathy, and myofascial pain syndrome.

OWCP also received hospital emergency department discharge instructions dated January 25 and April 7, 2018 signed by a physician assistant and registered nurses indicated that appellant was evaluated for back pain and injury and leg pain/weakness. The discharge diagnoses were viral respiratory illness with wheezing and right leg peripheral neuropathy.

In office clinic notes dated August 16 and September 25, 2018, Dr. Asma Tariq, a family practitioner, provided diagnoses of hypertension, low back pain, history of blurry vision, overweight, neuropathy, and fatigue.

Dr. Luke S. Bianco, a Board-certified ophthalmologist, noted in a September 25, 2018 report, that appellant was evaluated for diabetes. He found that she had no diabetic retinopathy in either eye on a baseline retina examination.

By letter dated January 29, 2019, appellant advised the Board that she wished to withdraw her appeal of the August 1, 2018 OWCP decision. On February 19, 2019 she requested reconsideration before OWCP.

In support of her reconsideration request, appellant submitted additional reports and hospital emergency department discharge instructions dated May 14, 2015 through April 11, 2018

⁴ On July 21, 2017 appellant appealed to the Board and, by order dated November 16, 2017, the Board dismissed her appeal as she requested by letter dated September 24, 2017. Docket No. 17-1597, *id.*

signed by registered nurses and physician assistants. The discharge diagnoses again included right leg peripheral neuropathy and viral upper respiratory illness. Additional discharge diagnoses included type II diabetes mellitus with hyperosmolarity without nonketotic hyperglycemic-hyperosmolar coma, other schizophrenia, chronic pain syndrome, unspecified hyperlipidemia, impaired fasting glucose, and spondylosis, site unspecified.

Appellant resubmitted Ms. Wong's June 19, 2015 report. In addition, she submitted Ms. Wong's May 19, June 25, July 23, and September 8 and 28, 2015 reports which included assessments of asthma, thoracic or lumbosacral neuritis or radiculitis, other and unspecified hyperlipidemia, nonalopathic lesion of sacral region, hypertension, obesity, type II diabetes, lumbago, and acquired spondylolisthesis.

Laboratory reports dated November 29, 2015 and January 25, 2018 provided test results.

In reports dated April 27 and May 22, 2017, and April 19, 2018, Dr. Tariq reexamined appellant. He reiterated his diagnoses of low back pain and hypertension. Dr. Tariq also diagnosed other chronic pain, abdominal pain, rash, sciatica associated with disorder of the lumbar spine, mixed hyperlipidemia, and prediabetes. In discharge instructions, he indicated that appellant was evaluated on September 16, 2018. The discharge diagnoses were bilateral leg pain and paresthesias/numbness.

In a report dated February 1, 2018, Dr. Patrick Justiz, a Board certified family practitioner, examined appellant and provided an assessment of unspecified acute upper respiratory infection.

Additional hospital emergency department discharge instructions were submitted. In July 22, 2018 hospital emergency department discharge instructions, Dr. Angela F. Bell, a physician specializing in emergency medicine, provided a discharge diagnosis of gastroesophageal reflux. In discharge instructions dated October 2, 2018, Dr. Robert A. Castillo, a Board-certified family practitioner, diagnosed a history of spinal stenosis and lower back pain. Dr. Mark A. Eller, an emergency medicine specialist, in discharge instructions dated November 8, 2018, diagnosed chronic right leg pain.

On January 3, 2019 Dr. Evelyn Mbanefo⁵ reported assessments of essential primary hypertension and chronic pain syndrome.

By order issued on February 27, 2019,⁶ the Board dismissed appellant's appeal of OWCP's August 1, 2018 decision as requested in her January 29, 2019 letter.

OWCP thereafter continued to receive medical evidence. In additional reports dated January 29 and March 18, 2019, Dr. Nasr reiterated his prior assessments of lumbar radiculitis, lumbar degenerative disc disease, lumbar facet arthropathy, and myofascial pain syndrome.

A September 8, 2015 lumbar spine x-ray, ordered by Dr. Kendall Wong, a diagnostic radiologist, noted impressions of borderline disc space narrowing at the L4-5 level suggesting

⁵ The Board notes that Dr. Mbanefo's professional qualifications are not contained in the case record.

⁶ Docket No. 18-1811, *supra* note 3.

discogenic disease; grade 1 spondylolisthesis of L4 on L5 presumably simply due to degenerative change; minimal degenerative changes with maintenance of the vertebral alignment; and pelvic calcifications felt most consistent with phleboliths.

In a March 22, 2018 lumbar spine MRI scan report, Dr. Michael Shin, a diagnostic radiologist, provided an impression of degenerative disc disease at L4-5 with diffuse disc bulging and severe bilateral facet hypertrophy resulting in mild central canal stenosis and bilateral neural foraminal narrowing.

Appellant resubmitted Dr. Gonser's October 12, 2016 lumbar spine MRI scan report.

Additionally, appellant submitted a discharge summary report dated November 2, 2015 signed by a physical therapist.

On April 9, 2019 appellant continued to request reconsideration of OWCP's August 1, 2018 decision.

By decision dated April 16, 2019, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.⁷

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁸

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁹ If it chooses to grant reconsideration, it reopens

⁷ 5 U.S.C. § 8128(a); *see T.K.*, Docket No. 19-1700 (issued April 30, 2020); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *W.C.*, 59 ECAB 372 (2008).

⁸ 20 C.F.R. § 10.606(b)(3); *see L.D.*, *id.*; *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁹ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

and reviews the case on its merits.¹⁰ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹¹

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

Appellant's timely April 9, 2019 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, the Board finds that she did not advance a relevant legal argument not previously considered by OWCP. Consequently, appellant is not entitled to further review of the merits of her claim based on either the first or second above-noted requirements under 20 C.F.R. § 10.606(b)(3). The Board further finds that she did not submit relevant and pertinent new evidence not previously considered by OWCP.

The Board further finds that appellant did not submit relevant and pertinent new evidence in support of her reconsideration request under 20 C.F.R. § 10.606(b)(3). OWCP previously denied her claim because the medical evidence of record did not contain a rationalized opinion finding that her diagnosed conditions were causally related to the accepted employment factors. In support of her reconsideration request, appellant submitted new reports dated April 27, 2017 through March 18, 2019 from Drs. Tariq, Nasr, Castillo, and Eller who diagnosed lumbar and bilateral leg conditions. None of these physicians, however, provided a medical opinion as to whether appellant's diagnosed conditions were causally related to the accepted employment factors. The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹²

Likewise, the reports dated February 1, July 22, and September 25, 2018, and January 3, 2019 of Drs. Bell, Justiz, Bianco, and Mbanefo are new, but do not contain an opinion on the causal relationship between appellant's gastroesophageal reflux, upper respiratory infection, hypertension, and chronic pain syndrome, and the accepted employment factors. Thus, the Board finds that this evidence is insufficient to warrant a merit review of the claim.¹³

Additionally, while appellant submitted new diagnostic reports dated September 8, 2015 and March 22, 2018 from Dr. Wong and Dr. Shin and laboratory reports dated November 29, 2015 and January 25, 2018, the Board has explained that diagnostic studies, standing alone, lack probative value as they do not address whether appellant's employment duties caused a diagnosed

¹⁰ *Id.* at § 10.608(a); *see F.V.*, Docket No. 18-0230 (issued May 8, 2020); *M.S.*, 59 ECAB 231 (2007).

¹¹ *Id.* at § 10.608(b); *see B.S.*, Docket No. 20-0761 (issued January 29, 2021); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹² *Y.L.*, Docket No. 20-1025 (issued November 25, 2020); *E.W.*, Docket No. 19-1393 (issued January 29, 2020); *R.R.*, Docket No. 18-1562 (issued February 22, 2019); *K.B.*, Docket No. 18-1392 (issued January 15, 2019).

¹³ *Id.*

condition.¹⁴ These reports are therefore irrelevant and do not constitute a basis for reopening the claim as they do not address the particular issue involved.¹⁵

Reports dated May 14, 2015 through April 11, 2018 from physician assistants, registered nurses, and a physical therapist were also submitted. The Board finds that submission of these reports did not require reopening appellant's case for merit review because they have no probative value on the underlying issue on reconsideration. These reports do not constitute competent medical evidence because physician assistants, registered nurses, and physical therapists are not considered physicians as defined under FECA.¹⁶ Therefore, this evidence is not relevant and is insufficient to require a merit review.¹⁷

Appellant resubmitted Dr. Gonser's October 12, 2016 lumbar spine MRI scan report. The Board has held that evidence that repeats or duplicates evidence already in the case record, has no evidentiary value, and does not constitute a basis for reopening a case.¹⁸ As appellant did not provide relevant and pertinent evidence, she is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).¹⁹

The Board, accordingly, finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.²⁰

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹⁴ See *Y.H.*, Docket No. 18-1618 (issued January 21, 2020); *S.D.*, Docket No. 18-1734 (issued March 12, 2019).

¹⁵ *Supra* note 12.

¹⁶ Section 8101(2) of FECA provides that a physician "includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law." 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). See also *supra* note 9 at Chapter 2.805.3a(1) (January 2013); *D.C.*, Docket No. 19-0354 (issued May 27, 2020) (physician assistants are not physicians under FECA); *D.S.*, Docket No. 19-1657 (July 20, 2020) (registered nurses are not considered physicians under FECA); *D.S.*, Docket No. 18-0353 (issued February 18, 2020) (physical therapists are not considered physicians under FECA); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA).

¹⁷ *Id.*

¹⁸ *J.V.*, Docket No. 19-0990 (issued August 26, 2020); *D.M.*, Docket No. 18-1003 (issued July 16, 2020); *L.C.*, Docket No. 19-0503 (issued February 7, 2020); *A.A.*, Docket No. 18-0031 (issued April 5, 2018).

¹⁹ *Supra* note 9.

²⁰ *D.G.*, Docket No. 19-1348 (issued December 2, 2019).

ORDER

IT IS HEREBY ORDERED THAT the April 16, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 14, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board